No. 512

In the Supreme Court of the United States

October Term, 19[illegible]

[illegible]

v.

[illegible]

ON PETITION [illegible]
STATES CIRCUIT [illegible]
CIRCUIT

[illegible]

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:	
Andrews v. *United States*, 162 U. S. 420	8
Ayers v. *United States*, 58 F. (2d) 607	6
Butts v. *United States*, 273 Fed. 35	8
Casey v. *United States*, 276 U. S. 413	7
Cline v. *United States*, 9 F. (2d) 621	7
Cox v. *United States*, 96 F. (2d) 41	6
Fisk v. *United States*, 279 Fed. 12	8
Goode v. *United States*, 159 U. S. 663	8
Grimm v. *United States*, 156 U. S. 604	8
Hobbs-Western Co. v. *Employers' Liability Assur. Corp. Ltd.*, 102 F. (2d) 32	6
Humphreys Gold Corporation v. *Lewis*, 90 F. (2d) 896	6
Johnstone v. *United States*, 1 F. (2d) 928	7
Mansfield Hardwood Lumber Co. v. *Horton*, 32 F. (2d) 851	6
Price v. *United States*, 165 U. S. 311	8
Rosen v. *United States*, 161 U. S. 29	8
Sonzinsky v. *United States*, 300 U. S. 506	6
Sorrells v. *United States*, 287 U. S. 435	7, 8
Swallum v. *United States*, 39 F. (2d) 390	7, 8
United States v. *Becker*, 62 F. (2d) 1007	8
United States v. *Ginsburg*, 96 F. (2d) 882, certiorari denied, 305 U. S. 638	6
United States v. *Siegel*, 16 F. (2d) 134	8
Wiborg v. *United States*, 163 U. S. 632	6
Statutes:	
Section 2554 (a) of the Internal Revenue Code (26 U. S. C. 2554 (a))	2
Section 2557 (b) of the Internal Revenue Code	2

565391—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 512

JOSEPH M. KAISER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 96–99) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered October 28, 1943 (R. 99). The petition for a writ of certiorari was filed November 27, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, assuming that the question is open on the record, the evidence shows that petitioner was entrapped into committing the crimes charged in the indictment.

STATUTE INVOLVED

Section 2554 (a) of the Internal Revenue Code (26 U. S. C. 2554 (a)) reads:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a)[1] except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

STATEMENT

Petitioner was charged in a two-count indictment with unlawfully selling morphine sulphate on June 30 and August 10, 1942, without written orders of the purchaser on forms prescribed for that purpose, in violation of Section 2554 (a) of the Internal Revenue Code (R. 2–3). He was found guilty on both counts (R. 79) and was sentenced generally to imprisonment for one year and a day (R. 44, 80).[2]

In support of the indictment the Government offered the testimony of four witnesses showing

[1] This section relates to "opium, coca leaves, any compound, salt, derivative, or preparation thereof." Morphine sulphate, the drug here involved, is a derivative of opium.

[2] See Section 2557 (b) of the Internal Revenue Code.

that one Hollenbeck had made purchases of morphine sulphate from petitioner on June 30 and August 10, 1942. Hollenbeck testified that he had known petitioner for about two years and that he telephoned him on May 27, 1942, stating "I would like to get a couple of those mares." (R. 10–11.) Petitioner told Hollenbeck to meet him at a race track near Chicago. Under the surveillance of three narcotic agents Hollenbeck met petitioner at the appointed place, and petitioner informed Hollenbeck that he had ordered "the morphine" but that he would not receive it for a day or so. The next day petitioner called Hollenbeck and arranged to meet him on May 30 at the same track. (R. 11.) This meeting was thereafter postponed until June 3, and when the two met on that date, petitioner informed Hollenbeck that the morphine had not yet arrived but requested an advance of money. Under the instructions of the narcotic agents, who maintained surveillance over all the meetings between Hollenbeck and petitioner (R. 8–9, 11, 12, 13–14, 15–17, 18–20), Hollenbeck paid petitioner $20 from money which the agents had furnished him to make the purchase. Later that month petitioner advised Hollenbeck that he had received the morphine and Hollenbeck arranged to meet petitioner at another race track on June 30 to consummate the sale (R. 12). On that date Hollenbeck paid petitioner an additional $100 furnished by the agents, and received from petitioner a quantity

of morphine (R. 13). Pursuant to similar arrangements, petitioner sold Hollenbeck another ounce of morphine on August 10, 1942 (R. 13–14). Both sales were made without written orders on the prescribed forms (R. 13, 14). After the August 10 transaction petitioner told Hollenbeck that he could sell him more morphine in about three weeks (R. 14–15). Hollenbeck's testimony in respect of the events related above was corroborated by agents Belcove, Sojat, and Wheeler (R. 7–10, 15–18, 18–21).

Petitioner, who is a veterinarian by profession (R. 27), testified that he did not see Hollenbeck on either June 30 or August 10 (R. 28), that on June 30 he was not at the race track, and that on August 10 he left the track prior to the time that Hollenbeck testified he had met petitioner (R. 29). He denied that Hollenbeck had requested him to sell morphine and asserted that he had never sold any to Hollenbeck (R. 29). Petitioner offered witnesses whose testimony tended to support his alibi (R. 23–24, 26–27), and others who testified that his general reputation was good (R. 21–22, 22–23, 25, 25–26). At the conclusion of the Government's case and again at the close of all the evidence, petitioner moved in general terms for a directed verdict; the motions were overruled (R. 21, 41).

So far as appears from the record, petitioner's counsel made no request for an instruction on the

subject of entrapment and none was given. (See R. 41–43.) He took no exceptions to the trial judge's instructions but, to the contrary, expressly approved them as "fair" (R. 43). No mention of the matter of entrapment was, apparently, made in petitioner's motions for a new trial and arrest of judgment, which were denied (R. 43–44). The record indicates that the claim of entrapment was made for the first time in petitioner's notice of appeal (R. 81–82) and assignment of errors (R. 82–85).

In affirming the conviction, the Circuit Court of Appeals for the Seventh Circuit held that since petitioner had not raised any issue of entrapment at the trial, he was precluded from doing so on the appeal (R. 96–99).

ARGUMENT

Petitioner contends (Pet. 15–19) that his motion for a directed verdict should have been sustained because the evidence showed that he was entrapped.

(1) However, as the court below pointed out (R. 96–97), and as shown in the Statement, *supra*, p. 4, petitioner, relying for his defense upon an alibi, did not at any stage of the proceedings in the trial court, so far as the record discloses, assert a claim of entrapment. The Government did not therefore attempt to meet any such defense. In these circumstances and in the absence of plain error (see pp. 6–9, *infra*), the circuit

court of appeals properly invoked the general rule that an appellate court will review only rulings made by the trial court on issues raised before it. A general motion for a directed verdict stating no specific grounds therefor, such as petitioner made at the trial, is insufficient to save for review any question other than the legal sufficiency of the evidence to convict. See e. g., *United States* v. *Ginsburg,* 96 F. (2d) 882, 886 (C. C. A. 7), certiorari denied, 305 U. S. 638, which involved a situation identical with the one here; *Mansfield Hardwood Lumber Co.* v. *Horton,* 32 F. (2d) 851, 852 (C. C. A. 8); *Ayers* v. *United States,* 58 F. (2d) 607, 608–609 (C. C. A. 8); *Humphreys Gold Corporation* v. *Lewis,* 90 F. (2d) 896, 899 (C. C. A. 9); *Cox* v. *United States,* 96 F. (2d) 41, 43 (C. C. A. 8); *Hobbs-Western Co.* v. *Employers' Liability Assur. Corp. Ltd.,* 102 F. (2d) 32, 34 (C. C. A. 8); cf. *Sonzinsky* v. *United States,* 300 U. S. 506, 514.

(2) Certainly there would be no basis under "the clear error doctrine"[2] to overturn petitioner's conviction unless the record affirmatively shows that he was entrapped. The record furnishes no basis for any such claim. The evidence shows that although Hollenbeck, the decoy, set in motion the transactions which culminated in the illicit sales by telephoning to petitioner, all that he said to petitioner was, "I would like to get a

[2] *Wiborg* v. *United States,* 163 U. S. 632, 658.

couple of those mares" (R. 11). Petitioner apparently fully understood that by "mares" was meant morphine, and he immediately arranged a meeting with Hollenbeck in order to effectuate a sale. There is no suggestion in the record that any temptation or pressure other than the prospect of making a sale was brought to bear on petitioner in order to induce him to become a criminal, or that the government agents instigated the commission of the crimes. Petitioner's willingness to make the sales charged is apparent from his dealings with Hollenbeck and from the further evidence that he contemplated making additional sales (R. 14–15). Thus it is clear that his acts were not inspired by the government agents and were not the "product of the creative activity of [the Government's] own officials" (see *Sorrells* v. *United States,* 287 U. S. 435, 451). Rather, petitioner's acts resulted from his own antecedent criminal propensity which led him to seize upon the opportunity presented by the decoy's request for "mares" to effectuate the illicit sales. This Court has held on similar facts that a mere request by a decoy to purchase, to which a defendant "acceded without hesitation and as a matter of course" did not constitute entrapment. *Casey* v. *United States,* 276 U. S. 413, 419. See also, *Cline* v. *United States,* 9 F. (2d) 621 (C. C. A. 9); *Johnstone* v. *United States,* 1 F. (2d) 928, 929 (C. C. A. 9); cf. *Swallum* v. *United States,* 39 F.

(2d) 390, 392–393 (C. C. A. 8); *Fisk* v. *United States,* 279 Fed. 12, 17–18 (C. C. A. 6).[3]

The test of entrapment which this Court has approved is whether "the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States,* 287 U. S., at 442. Where an issue of entrapment is raised, a jury question is presented (*id.,* at p. 452), and it is open to the prosecution to show that the government agents had reasonable suspicion that the accused was engaged in similar criminal conduct and was predisposed to commit the offense (*id.,* at p. 451). See also *Swallum* v. *United States, supra,* at pp. 392–393; *United States* v. *Becker,* 62 F. (2d) 1007, 1008–1009 (C. C. A. 2); *Butts* v. *United States,* 273 Fed. 35, 37 (C. C. A. 8); *United States* v. *Siegel,* 16 F. (2d) 134, 135–137 (D. Minn.). But there

[3] In other cases this Court has held that the use of decoy letters by government agents in response to which defendants sent through the mails obscene books, letters, pictures and prints, or information where such objects might be obtained, did not constitute entrapment. These cases establish the principle that government agents may afford opportunity or facilities for the commission of the offense, using artifice and stratagem to catch those engaged in criminal enterprises. *Price* v. *United States,* 165 U. S. 311, 315; *Andrews* v. *United States,* 162 U. S. 420, 423; *Rosen* v. *United States,* 161 U. S. 29, 42; *Goode* v. *United States,* 159 U. S. 663, 669; *Grimm* v. *United States,* 156 U. S. 604, 610.

was, of course, no occasion for the Government to submit any such proof in the instant case, absent any issue of entrapment.

CONCLUSION

The case involves no conflict of decisions and presents no question calling for further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
Special Assistant to the Attorney General.
MALCOLM A. HOFFMANN,
Attorney.

DECEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943